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Provisional summary record of the 3425th meeting
Held at the Palais des Nations, Geneva, on Monday, 9 July 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

Mr. Tladi (Special Rapporteur), summing up the debate on his third report, said that he wished first to address the concern about methods of work expressed by Mr. Nolte and shared by Mr. Rajput, Mr. Grossman Guiloff and Mr. Murase. The non-production of commentaries had nothing to do with lack of effort on his part, as Mr. Rajput's statement had seemed to intimate. He agreed with everything that Mr. Hmoud had said, but wished to point out that the particular method of work for the topic had been proposed during his summing up of the debate on his first report as a compromise in response to concerns expressed by Mr. Nolte, Mr. Murphy, Sir Michael Wood and others, who had queried the suggestion in that report that the Commission should pursue a fluid approach, adopting some conclusions but tweaking them as work progressed. The current method of work would not have been adopted but for the specific concerns expressed. He noted that when the compromise proposal had been made, Mr. Nolte had not expressed any reservation.

The topic had always been considered in the second part of the Commission's annual session. In no case would it have been possible, in the time remaining after finalization in the Drafting Committee, to prepare commentaries, submit them for editing and translation and have them ready for adoption by the Commission. To do so the following year would only prove confusing for States. If, in 2019, the topic was considered in the first part of the session, a full set of commentaries would be produced for consideration by the Commission.

On the whole, with some strongly worded exceptions, members of the Commission had been supportive of his approach and the draft conclusions proposed. He welcomed the proposal by Mr. Ouazzani Chahdi to include a bibliography. On the use of terms, he agreed with the need for consistency, as highlighted by various members. Mr. Vázquez-Bermúdez and Sir Michael Wood had questioned the use of the terms "effects" and "consequences"; he was happy to opt for the former. He also agreed with those members who had said that the word "void" was more appropriate than "invalid" in draft conclusion 11.

Many members had stressed the importance of the topic. Ms. Escobar Hernández had referred to the effects that norms of *jus cogens* could have on the legal system. Some members, in particular Mr. Peter, had emphasized the immense power of the concept as a tool for social change, while others, including Sir Michael Wood, had stressed that it might pose a serious risk if not accompanied by appropriate and responsible safeguards.

The Chair, speaking in his capacity as a member of the Commission, had suggested that the Special Rapporteur's report contributed nothing new. While novelty might be appropriate in academia, the topic had been placed on the Commission's programme of work on the clear understanding that the aim was not to develop new rules but to make existing rules more accessible and understandable, *inter alia* to domestic courts, which found themselves having to apply rules of international law, including peremptory norms, more frequently. The Chair had questioned the logic of draft conclusion 15 and asserted that none of the reports explained what made norms of *jus cogens* different from norms of ordinary customary international law. While that was not the purpose of the third report, the second report had made the distinction clear. Draft conclusion 5, adopted on the basis of the second report, had determined the relationship between *jus cogens* and other norms of customary international law, while draft conclusion 4 set out the requirements for *jus cogens*, which differed from those for customary international law in that a norm of *jus cogens* must be recognized and accepted by the international community of States as a whole as a norm from which no derogation was permitted. If that distinction was thought insufficient, Commission members should say so, but it was wrong to assert that the distinction was not evident.

The Chair had also suggested that there was some inconsistency in the report, questioning whether an exception to immunity *ratione materiae* for violations of *jus cogens* norms was needed if such norms took precedence over other norms of customary international law in any event. That statement assumed that there was a direct conflict between immunity rules and the substantive rules of *jus cogens* relating to the prohibition

of "*jus cogens* crimes" — itself a term that Ms. Escobar Hernández and Sir Michael Wood had found dubious. In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, however, the International Court of Justice had demolished that assumption, and further justification was therefore required.

Mr. Murase had drawn attention to the need to consider the definition and nature of *jus cogens* from the perspective of State responsibility. That view accounted for much of his argument, including that the draft conclusions were based on confusion. Most members of the Commission, himself included, did not believe that a different definition of *jus cogens* existed for each area of international law.

With regard to the structure of the report, he agreed with Mr. Ruda Santolaria and Mr. Peter that a recap at the end of each of section would have been helpful. He had structured each of his three reports differently in the hope of making them accessible to readers, and he would continue to explore ways to achieve that.

Despite Mr. Zagaynov's strong disagreement with the approach taken in the third report and some of the draft conclusions, the constructive and respectful nature of his criticism was greatly appreciated. He had rightly emphasized the dearth in practice relating to *jus cogens*, which was particularly stark when it came to consequences. Though challenging, the problem was not insurmountable and did not mean that the Commission should pursue a conservative approach, as Mr. Zagaynov had suggested. Whether practice was abundant or sparse, the Commission's role should be to assess it faithfully, together with the other sources it usually relied on, in order to produce the most accurate description of international law possible. As Mr. Saboia, Mr. Hmoud, Mr. Šturma and others had noted, the third report did that. As Special Rapporteur he would not pursue either a conservative or a liberal approach, and nor should the Commission.

The main concern that Mr. Murphy's suggested rearrangement of material sought to address seemed to be that the structure and wording of the draft conclusions underplayed the procedural requirements set out in articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties to the point of ignoring them altogether. In his view, however, the placement of draft conclusion 14 was intended to indicate that it covered all the preceding draft conclusions and did not undermine the importance of the procedure it described. Mr. Murphy's suggestion would disturb the cogent logic of the current structure. Similarly, he did not wish to see paragraphs 1 and 2 of draft conclusion 10 separated. Although they covered different mechanisms by which a treaty might become void, the ultimate consequence was the same. Mr. Murphy seemed to be reading too much into the structure of the 1969 Vienna Convention, which dealt with much more than the consequences of peremptory norms. Even if part V of the Convention had been drafted with only *jus cogens* in mind, invalidity could result from both article 53 and article 64. Mr. Murphy's suggestions seemed to relate more to how those consequences were reached than to the consequences themselves. Even those members of the Commission who had echoed some of Mr. Murphy's strong criticism of other aspects of the report had not endorsed his structural proposals. Save for a few minor changes, he would strongly prefer, as Special Rapporteur, not to adopt the elaborate and rather drastic rearrangement proposed.

Various members had referred to the lack of certainty concerning the meaning of "conflict". As Mr. Park had noted, the issue was inextricably linked with the question of procedure and could usefully be addressed in the commentary rather than in the text of the draft conclusions. Ultimately, determining whether there was a conflict could not be based on abstract considerations but would depend on the wording of each treaty and the content of the *jus cogens* norm in question.

Mr. Ouazzani Chahdi had taken exception to the reference in the report to cases before the European Court of Justice involving agreements between the European Union and Morocco. While it was true that what had been at issue in those cases were decisions of the European Council, the judgments and interpretation of the Court had been based on the agreements in question and concerned the validity and interpretation thereof. The judgments were therefore relevant.

Several members had raised the question of why general principles of international law had not been covered. Like Mr. Nolte, he found it hard to imagine general principles of

law that would conflict with norms of *jus cogens*. That said, although the report made it plain that the same situation pertained for treaties, resolutions of international organizations and customary international law, the draft conclusions made provision for other rules. He therefore agreed with the majority who had taken the view that general principles should not be excluded.

Most members had agreed that draft conclusion 10 was based on the 1969 Vienna Convention. Mr. Park had provided an interesting and useful comparison between the texts of several of the draft conclusions, including paragraphs 1 and 2 of draft conclusion 10, and the Convention, stating that they need not be subject to further debate. Mr. Šturma had called the provisions of draft conclusion 10 appropriate because they flowed from the relevant articles of the Convention. Mr. Nolte, more conservatively, had said that draft article 10 was a good point of departure.

Members had noted that paragraph 3 of draft conclusion 10, concerning interpretation, was different, as it did not appear in the 1969 Vienna Convention. Nonetheless, most members had agreed with its content. According to Mr. Šturma, it would allow most issues relating to *jus cogens* to be resolved. Mr. Rajput had agreed with the rationale behind the text but had concerns about the drafting, although the precise nature of his concerns remained unclear. The suggestion of employing a double negative might make the text cumbersome, but could be discussed by the Drafting Committee. He agreed with the view expressed by many members that paragraph 3 should also apply to the other sources of international law. His preference would be a single draft conclusion applicable to all the sources.

While Mr. Saboia had not expressed opposition to paragraph 3 of draft conclusion 10, he had cautioned that, if stretched too much, it could lead to unforeseen results, and that the Commission should not be seen as undermining the peremptory nature of *jus cogens*. While supportive of the paragraph, Ms. Lehto had warned against allowing it to be used to "remove the teeth" of article 53 of the 1969 Vienna Convention. A similar cautionary note had been sounded by Mr. Park, who had noted that such an approach could open the door to misuse. He had suggested that treaties in conflict with *jus cogens* would never be nullified but would instead be interpreted so as to be consistent with *jus cogens* norms, which, according to both Mr. Park and Mr. Saboia, was not a good thing. In their view, the basis for the consistent interpretation rule should not be, as suggested in the report, the principle of *pacta sunt servanda*. Mr. Park had asserted that, almost by definition, the concept of *jus cogens* denied that principle when the rules emanating from treaties were contrary to higher norms, and that a better basis for draft conclusion 10 (3) was the principle of good faith. Good faith was indeed central to the rule of consistent interpretation; however, that rule did not call for seeking an interpretation that was contrary to the treaty text purely to avoid nullity. Application of the principle occurred in the context of treaty interpretation. That was captured in draft conclusion 10 (3) by the qualification "as far as possible". As Mr. Hassouna had noted, interpreting treaties consistently with *jus cogens* was not a licence to override treaty interpretation rules.

To tackle Mr. Park's point, the commentary would need to be crafted so as to suggest that the provision was based not only on the principle of *pacta sunt servanda* but also on the need for coherence in interpretation; however, the principle of *pacta sunt servanda* was a significant element underpinning both that coherence and the integrationist approach to treaty interpretation. The objective of article 31 (3) (c) of the 1969 Vienna Convention was to avoid conflict between rules of international law where possible, including between rules emanating from the principle of *pacta sunt servanda* and those of superior status. Where it was possible, in good faith, to interpret a treaty by relying on all the means of interpretation, including article 31 (3), and still achieve a result consistent with *jus cogens*, that would always be preferable to invalidating the treaty. That, as explained by Mr. Vázquez-Bermúdez, was the essence of systemic integration in treaty interpretation.

Mr. Park had raised the question of what "as far as possible" meant. As Special Rapporteur, he agreed with Ms. Lehto and Ms. Escobar Hernández that the commentary could explain the meaning of the phrase, i.e. that such an interpretation must not go beyond the bounds of the Vienna rules for interpreting treaties. In addition, Mr. Zagaynov had

expressed scepticism about the beginning of the text, as the current draft seemed to establish a new rule of treaty interpretation. He had suggested that the language in the report itself, which drew expressly on article 31 (3) (c), might better reflect the inseparable organic connection between the proposed provision and other existing elements of the rules of interpretation of international treaties. Were the Drafting Committee to consider such a proposal, it might also address the concerns of Mr. Saboia and Mr. Park. He did not view the current wording as proposing a new rule of interpretation; it simply stated what could be observed in practice, which was an application of the existing rule in article 31 (3) (c) to situations involving *jus cogens*. Nonetheless, Mr. Zagaynov's proposal was acceptable to him.

While paragraphs 1 and 2 of draft conclusion 10 were generally agreeable to members of the Commission, they had attracted some discussion and proposals. Mr. Zagaynov had suggested that a general statement ought to be made that States should not conclude treaties that were in conflict with norms of *jus cogens*. He certainly agreed with that sentiment, but he doubted whether it should be expressed in the text itself. It might be more appropriately placed in the commentaries.

Mr. Nolte had expressed doubts about the second sentence of draft conclusion 10 (1), but had not explained the source of those doubts; Mr. Cissé had said that the sentence was superfluous. Mr. Murphy and many others had expressed the view that it did not belong in draft conclusion 10 as it addressed consequences. However, the idea that a treaty was invalid was just as much a consequence of *jus cogens* as the fact that such a treaty did not create rights or obligations, which was the essence of Mr. Nguyen's comment that the second sentence was a consequence of the first. Nonetheless, he would not object to Mr. Murphy's suggestion that the second sentence be moved to draft conclusion 12. The same arguments applied to the second sentence of draft conclusion 10 (2).

Draft conclusion 11 had been generally well received. Mr. Ruda Santolaria had particularly welcomed the distinction drawn between invalidity *ab initio* and *jus cogens superveniens*. Even Mr. Murphy's statement, which in almost all respects had been critical of the draft conclusions proposed, had referred to draft conclusion 11 as "unobjectionable", apart from the structural concerns already addressed. Although Mr. Zagaynov had not opposed the content of the draft conclusion, he had suggested the use of the word "void" instead of "invaiid". Mr. Nguyen had suggested some textual modifications, including altering "may be" to "is" or "shall be". As drafted, however, the wording was more consistent with Mr. Nguyen's appeal for the absolute prohibition of severability. He was not opposed to the other textual amendments proposed by Mr. Nguyen, if agreement could be reached within the Drafting Committee.

More serious concerns had been raised by Mr. Park, not directly in relation to draft conclusion 11 as such, but to the effect that, if that provision did not clarify how norms of *jus cogens* were formed, it could give rise to disputes as to when a norm of *jus cogens* was established. Many disputes could arise; however, the draft conclusions adopted by the Drafting Committee on the identification of norms of *jus cogens* could be applied to resolve those disputes. A State claiming that a norm of *jus cogens* had emerged before a certain date would need to show that at the said date the said norm met the requirements elaborated by the Drafting Committee in 2017. While the issue raised by Mr. Park was real, tools existed to resolve it.

Mr. Nolte had been in agreement with paragraph 2 of draft conclusion 11, save for subparagraphs (b) and (c). Mr. Cissé, on the other hand, had suggested that subparagraphs (a) and (b) were sufficient and that it was (c) that was obscure and caused confusion. He himself did not agree that subparagraphs (b) and (c) addressed the same issues as (a), as suggested by Mr. Nolte, nor did he agree that (c) was confusing, as stated by Mr. Cissé; more importantly, unless there were specific reasons not to do so, he believed that the Commission should cleave as closely as possible to the provisions of the 1969 Vienna Convention.

Mr. Nolte had raised a more fundamental question concerning paragraph 1 of draft conclusion 11: he was unconvinced that absolute non-severability applied in cases of a treaty conflicting with an existing norm of *jus cogens*. The issue had also been raised by Mr.

Rajput, who had said he was not convinced by the reasoning of the Commission in 1966 and felt that it would be better to use the wording of the 1969 Vienna Convention. In much the same vein, Mr. Hmoud had stated that, while he did not necessarily agree with the Convention on the distinction between cases arising under articles 53 and 64 for the purposes of severability, the distinction should be maintained.

As Special Rapporteur, his initial intention had been to question the content of the non-severability approach taken in the 1969 Vienna Convention, but he had failed to find strong enough reasons to deviate from the clear wording used therein. General Assembly resolution 33/28 A on the Camp David Accords, referred to by Mr. Nolte and referenced in the third report, provided some justification, but more was needed, particularly given Mr. Nolte's statement concerning the lack of practice in relation to immunity. Without a coherent legal basis in State practice, it would be difficult to depart from the provisions of the Convention, despite the concerns expressed by Mr. Rajput and Mr. Hmoud — which he shared — regarding the approach taken by the Commission and States in that instrument.

Mr. Nguyen had raised some interesting questions concerning the establishment of boundaries that were inconsistent with norms of *jus cogens*, but such issues arguably did not concern separability and should not be addressed by invoking a fundamental change of circumstances. *Jus cogens* had its own consequences, independent of *rebus sic stantibus*, and attempting to draw parallels might confuse matters. Mr. Peter had mentioned some of the shortcomings of *rebus sic stantibus*, including that the principle might not apply to *jus cogens*.

Draft conclusion 12 had attracted little comment and enjoyed broad support. As with other draft conclusions, members including Mr. Šturma and Mr. Zagaynov had noted that it generally followed the 1969 Vienna Convention. Mr. Nguyen had proposed some textual amendments that could be considered in the Drafting Committee. Some of them, supported by other members, were that the text should more closely track the wording of the 1969 Vienna Convention, including by reflecting the phrases "bring their mutual relations into conformity with the peremptory norms" and "in as far as possible" to qualify the elimination of consequences. Mr. Ouazzani Chahdi had suggested that draft conclusion 12 should be reworded.

Mr. Murphy, joined by Mr. Huang, had expressed fundamental concerns. He acknowledged that articles 69 and 70 of the 1969 Vienna Convention also applied to treaties that were void on account of conflict with *jus cogens* norms; however, the Commission was concerned with the specific consequences of *jus cogens*, not attempting to rewrite the Convention. As with State responsibility, there might be other consequences, such as the obligation to pay compensation under article 36 of the 2001 articles on the responsibility of States for internationally wrongful acts, but no one was seriously suggesting that because all those duties applied equally to breaches of *jus cogens* norms, they must be included in the draft conclusions, as they were not consequences peculiar to *jus cogens*. Like Mr. Jalloh, he did not, therefore, support the suggestion made by Mr. Murphy and Mr. Huang in that regard.

Draft conclusion 13 had also been generally acceptable to those members who had commented on it. Mr. Ruda Santolaria had rightly drawn attention to the Human Rights Committee's position that reservations contrary to *jus cogens* norms were not compatible with the object and purpose of human rights treaties, in particular the International Covenant on Civil and Political Rights. That point had actually been made in the third report. However, as explained in the report, that was a consequence of the rules on reservations and not of *jus cogens*. The commentary would obviously say something on the subject.

Mr. Nguyen and Mr. Murphy had asked why the phrase "as between the reserving State or organization or other organization" had been omitted. The reason was that the peremptory norm in question continued to apply as a matter of general international law. The commentary could make it clear that it also applied in the relationship between reserving States and/or organizations and other States. He would not be opposed to its inclusion if that was the wish of the Drafting Committee

Mr. Zagaynov, on the other hand, had suggested the inclusion of the qualification set forth in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, that the inclusion of a *jus cogens* norm in a treaty would not invalidate all reservations thereto. That point had already been captured in the report and would be included in the commentary, either to that provision or to draft conclusion 14, rather than in the text itself. Mr. Murphy and Mr. Nolte had also questioned the placement of draft conclusion 13. Its current position might indeed suggest that the procedure in draft conclusion 14 applied equally to the question of reservations. For that reason, it might be better to move draft conclusion 13 to appear after what was currently draft conclusion 14.

Draft conclusion 14 had been supported by most of the members who had participated in the debate, who had been of the opinion that an individual State should not have to decide by itself whether a treaty was invalid. Some of the suggestions for improvement had included broadening its scope to include other amicable procedures, or emphasizing that the International Court of Justice should be the last resort. Two members had been in favour of including all the steps laid down in article 65 of the 1969 Vienna Convention and to that end a proposal had been made to insert a first paragraph in the draft conclusion which would read:

> A State party which invokes the invalidity or a treaty as resulting from a conflict with a peremptory rule of general international law (*jus cogens*) shall notify the other parties of its claim. If another party raises an objection, the States parties concerned shall negotiate in good faith with a view to agreeing on a solution or an appropriate procedure to resolve the dispute. The invoking party may give effect to its claim in relation to any objecting party after invalidity of the treaty has been determined as agreed by them.

While he was not opposed to that proposal, which seemed to have attracted much support, a few substantive points called for comment. First, the last sentence did not come from article 65. It would therefore be interesting to know why and on what basis it had been included. At any rate, it might be useful briefly to discuss that sentence in the Drafting Committee. Secondly, the language of the proposal built on positions concerning other dispute settlement procedures advocated by many members. The Drafting Committee would have to consider whether "negotiations" to resolve disputes turning on whether a rule conflicted with a norm of *jus cogens* subjected the consequences of *jus cogens* to agreements between two or more States. In other words, the issue to ponder was whether it was possible for a treaty that conflicted with a *jus cogens* norm to be spared the consequences of that conflict, if through negotiations the objecting State was granted concessions, whether in relation to the application of the treaty or otherwise. He concurred with Ms. Lehto that it was unnecessary to address procedural issues in the text itself. If the Commission wished to do so, the commentaries could make it plain that any such negotiations did not imply the right of States to contract out of *jus cogens* norms.

Mr. Reinisch and Ms. Escobar Hernández had offered very convincing arguments for excluding arbitration, namely the risk of fragmentation. Mr. Grossman Guiloff had held that the international legal system had ways of dealing with those potential problems. He personally wondered what justification could be given for departing from the 1969 Vienna Convention. Many members had correctly observed that not all States were party to the Convention and that, even among States parties, article 66 was subject to a number of reservations. Mr. Grossman Guiloff took the view that article 66 was probably not customary international law. Hence Mr. Park was right to warn against imposing a procedure that some States had expressly rejected. That concern had been expressed in a different way by Mr. Zagaynov, who doubted that the provision in draft conclusion 14 would apply to States which were not party to the 1969 Vienna Convention. However, draft conclusion 14 did not seek to impose anything on any State. First, the very title of the draft conclusion made it plain that the procedure was only recommended. Secondly, the text of the first paragraph explicitly stated that the recommended procedure was subject to the jurisdictional rules of the International Court of Justice. Finally, paragraph 2 emphasized the necessity of obtaining consent for judicial settlement. Nonetheless he agreed that the range of options for dispute settlement should be expanded.

Mr. Zagaynov had likewise questioned whether the recommended procedure should apply to any party to a dispute involving a potential conflict between a treaty provision and a *jus cogens* norm, or whether it should apply only to the parties to the treaty. His own view was that draft conclusion 14 should not address that matter, because, among other things, it was only a recommendation. Ultimately, in addition to any jurisdictional rules applicable to the International Court of Justice or any other dispute settlement procedure, the question of standing would arise. If a State had standing on a matter, it was unclear why it should be prevented from seeking a resolution of the dispute. For example, if two States entered into an agreement to use force against a third State, it was hard to see why the third State, which was under threat of an armed attack, should be prevented — provided that the jurisdictional requirements were met — from turning to a dispute settlement procedure to secure a determination of whether that agreement violated a *jus cogens* norm. Such action had been taken in two recent cases (*C-104/16 P* and *C-266/16*) heard by the European Court of Justice where the validity of agreements between the European Union and Morocco had been challenged by the Frente Polisario, which was not a party to the agreement.

While Mr. Zagaynov apparently preferred to drop draft conclusion 14, Mr. Murphy seemed to be in favour of strengthening it since, as it stood, it only recommended a procedure that was in fact legally binding for States parties to the 1969 Vienna Convention. He personally failed to see why that was a problem. After all, for States parties to the Convention, the procedure remained legally binding under the Convention and no reasonable international lawyer would ever construe draft conclusion 14 as meaning that States parties to the Convention were no longer bound by the procedures set forth in the Convention to which they were party. The alternative, in other words purporting to make that procedure binding on States not party to the Convention, would be hugely problematic, particularly since the draft conclusions were not binding. He had no problem with clarifying that parties to the Convention remained bound by the procedures set forth therein, although that issue could be addressed in the commentary.

Mr. Cissé, who was not in favour of the second paragraph, had proposed language which seemed to go against the essence of that paragraph and which might lead the Commission into areas where it should not tread. He was personally more inclined to accept the suggestion made by Ms. Galvão Teles, to reformulate the second paragraph as a "without prejudice" clause.

Although most members had agreed with draft conclusion 15, two had taken issue with the language of the first paragraph. What the text meant to signify was that a rule of customary international law would not arise if the content of that potential rule conflicted with *jus cogens* norms. He would not, however, be opposed to wording along the lines of "a general practice accepted as law (*opinio juris*) in conflict with a peremptory norm of general international law (*jus cogens*) does not give rise to a rule of customary international law" or "a customary international law rule does not arise if the practice on which it is based conflicts with a peremptory norm of general international law (*jus cogens*)".

Mr. Zagaynov and Mr. Park had raised questions about the persistent objector doctrine. In the report, it was noted that the answer seemed to be self-evident. A peremptory norm was qualitatively different to a normal rule of customary international law and their consequences were therefore different. One of the qualitative differences in the consequences was that the persistent objector doctrine did not apply to peremptory norms. While Mr. Zagaynov did not seem to gainsay the logic of denying persistent objection in the case of peremptory norms, he considered that it was necessary to link the effect of objection during the formation of customary international law with the non-applicability of persistent objection once a norm had achieved *jus cogens* status.

Mr. Rajput's argument that it was essential to make it plain that the persistent objector doctrine applied until such time as a norm became peremptory seemed to have little to do with the topic, as it was a matter that was clearly covered by the draft conclusions on the identification of customary international law. Sir Michael Wood seemed to question the *lex lata* status of the conclusion regarding persistent objectors, but without stating his reasons; he had also suggested that the report stated that there was no practice in that regard, whereas in fact paragraph 143 cited three cases.

Mr. Murphy had expressed concern about the conceptual issue of the modification of a peremptory norm by a subsequent peremptory norm. Indeed, there was nothing in the draft conclusions as they stood which prevented the possibility of a new *jus cogens* norm conflicting with and replacing a previous one. However, for that to happen, such a norm could not be a normal rule of customary international law; it would have to be accepted and recognized as a norm from which no derogation was permitted. Mr. Nolte's proposal to insert the phrase "not of a *jus cogens* character" might solve the problem. At any rate, that was an issue for the Drafting Committee and it would have to be addressed in the commentary.

Mr. Rajput had been the only member to question the correctness of the substance of the first paragraph of draft conclusion 15, and to contend that a rule of customary international law without peremptory status could arise and apply even if it were inconsistent with a peremptory norm. He had based that astonishing claim on an argument pertaining to humanitarian intervention and the responsibility to protect. In fact, neither of those concepts were exceptions to the prohibition of the use of force, albeit for different reasons. Although the *jus cogens* norms in question were often referred to by the term "prohibition of the use of force", the Commission used the term "prohibition of aggression", which encompassed the primary rule and exceptions thereto. The evolution of a new exception would thus have to be part of that peremptory rule. In other words, it would have to be recognized and accepted by the international community, with the result that a conflict with *jus cogens* would not arise.

There had been little comment on draft conclusion 16. Several members had expressed the view that the term "unilateral acts" should be clarified and limited to unilateral acts of State that were capable of establishing legal obligations. That should be done and the three categories of unilateral acts mentioned by Mr. Murase should likewise be considered in the draft conclusions.

Draft conclusion 17 had been generally supported by the members of the Commission. Mr. Šturma had agreed that peremptory norms did have consequences for binding resolutions of international organizations, including those of the Security Council and he had put forward some wording for consideration by the Drafting Committee. Mr. Vázquez-Bermúdez had been of the opinion that Security Council resolutions were not *per se* sources of law and Ms. Escobar Hernández had thought it wise to consider all instruments with the capacity to produce legal obligations, even if they were not sources of law. Several members had been of the view that other tools for establishing obligations should be included, not just binding resolutions, and that other international organizations should be covered. The various textual proposals made could be considered by the Drafting Committee.

While some members had questioned the need for a specific reference to the Security Council, others had contended that such a reference was appropriate. A very interesting mini-debate had ensued. He had been more inclined to the view that, since the discussion of the effects of *jus cogens* on international organizations' acts tended to take place in the context of debates on Security Council decisions, they deserved special attention on account of the Council's unique powers flowing from Article 103 of the Charter of the United Nations. Mr. Huang's suggestion that procedural requirements were the only test of the legality of the Security Council's decisions was not consonant with Article 24 of the Charter. Moreover, as two other members had noted, it was unclear how the Charter itself could be subjected to *jus cogens*, when an entity established by the Charter was not. In view of Mr. Huang's comments, it was manifestly appropriate to refer explicitly to the Security Council in the text of the draft conclusion. Only three members had opposed draft conclusion 17, one of them on the grounds of lack of practice in support of it. In that connection, he referred that member to paragraphs 153 to 156 of the report. Mr. Rajput's objections were somewhat opaque. He seemed to agree with the principle, but questioned its applicability to specific norms. Clearly as not all the norms which he had mentioned were *jus cogens*, his concerns had no foundation. Lastly, he had no objection to including language on the issue of separability in response to a point raised by two members.

Draft conclusions 18 and 19 had received almost unanimous approval. He had no objection to the language proposed by Ms. Galvão Teles which tracked that of *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. He also agreed with the seven members who had maintained that draft conclusions 18 to 21 should apply not only to States but also to international organizations.

Mr. Rajput had latched on to the desire to insert the word "serious" in draft conclusion 21 and had mistakenly sought to apply it to draft conclusion 18 as well. He had advanced a myriad of reasons for that by linking the case law of the International Court of Justice with the draft articles on State responsibility. Nowhere in those draft articles was it stated that the *erga omnes* obligations stemming from a peremptory norm depended on the seriousness of the breach of that norm. Secondly, and more importantly, Mr. Rajput's assertion was based on a fundamental misunderstanding both of the third report and of the relationship between *erga omnes* obligations and peremptory norms. *Erga omnes* obligations were certainly not the same thing as peremptory norms and, as Mr. Reinisch had pointed out, the third report made that clear. Any reference to paragraph (7) of the commentary to chapter III therefore lacked pertinence. Mr. Rajput seemed to assume that obligations — *erga omnes* or otherwise — stood on their own, whereas they flowed from rules or norms. Hence the two concepts, while not synonymous, were related. Peremptory norms were not *erga omnes* obligations, but they produced *erga omnes* obligations. Mr. Rajput also seemed to claim that the existence of obligations depended on a breach. It did not. A peremptory norm established an *erga omnes* obligation, regardless of whether that peremptory norm had been breached.

Furthermore, Mr. Rajput's quotation of parts of the commentaries to the draft articles was conveniently selective. For example, when quoting paragraph (7) of the commentary to chapter III, he had ignored the passage immediately preceding it which read:

> The examples which [the International Court of Justice] has given of obligations towards the international community as a whole concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention involve obligations to the international community as a whole.

It was equally inaccurate to suggest that the Special Rapporteur, James Crawford, shared his approach. In paragraph 81 (b) of his first report (A/CN.4/490), Crawford observed that:

> Under existing international law, two possible categories are obligations *erga omnes*, and rules of *jus cogens*. Yet, although they consist by definition of norms and principles which are of concern to the international community as a whole, those categories do not correspond in any simple way to the notion of the "most serious breaches". There can be very serious breaches of obligations which are not owed *erga omnes* ... and minor breaches of obligations which are owed *erga omnes*.

With respect to draft conclusion 20 (3), he was unsure whether Mr. Zagaynov's notion of the priority of cooperation mechanisms under collective security measures was correct. While collective security measures were the most likely means of cooperation, that did not signify that they took priority. Furthermore, the report had plainly shown that some cooperative measures which were possible as part of collective security measures could not be undertaken unilaterally or on an *ad hoc* basis. Those nuances could be brought out in the commentary. He was not averse to the proposal to add language from the advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* to the effect that the consequences of non-recognition should not have a negative effect on, or disadvantage, the affected population and, consequently, that acts related to the civilian population, such as registration of births, deaths and marriages, ought to be recognized. That position had already been expressed in paragraph 100 of the report and he had intended to propose its inclusion in the commentary. However, there was also merit in including it in the text.

Four members had suggested the addition of language on countermeasures. The legality of the latter was highly controversial. For that reason, it might be unwise for the Commission to venture into that terrain. Nevertheless, he was open to any proposal that members might make in the Drafting Committee.

Some members had questioned the advisability of omitting the word "serious" in draft conclusion 21. That omission had not been an oversight. It was true that the Commission should adhere closely to the draft articles on responsibility of States for internationally wrongful acts unless there was good reason to depart from them. In that connection, he asked members to consider Mr. Hmoud's contention that at the time the draft articles on State responsibility were adopted, the Commission did not view the duty to cooperate as *lex lata* but was engaging in a process of progressive development. Since the provision had become *lex lata*, the question arose of whether the Commission should not engage in a process of progressive development by removing the word "serious". By insisting on its inclusion, the Commission would appear to be suggesting that it was lawful for States to recognize or even assist in breaches of *jus cogens* that were not serious. "If a single case of torture were deemed not to be serious, that would imply that one State could assist another State in torturing an individual. If the Commission insisted on retaining the word "serious", the commentary would need expressly to state that in 2018 the Commission took the view that a State was free to recognize or even assist in breaches of *jus cogens* that were not serious. At the same time, the commentary would have to make it clear that some members, including himself, dissented from that view.

Draft conclusions 22 and 23 touched on the most sensitive issues. Most Commission members supported their inclusion. However, some members, namely Mr. Murphy, Sir Michael Wood, Mr. Zagaynov, Mr. Nolte, Mr. Rajput and Mr. Huang, were strongly opposed. Others, such as Mr. Ruda Santolaria, had said that, although they were not opposed to the content of draft conclusions 22 and 23, they believed that those draft conclusions touched an issue that should be dealt with in the context of the topic of immunity of State officials from foreign criminal jurisdiction.

There was one particular criticism with which he had a great deal of sympathy. Mr. Murphy, Mr. Zagaynov, Mr. Nolte and Sir Michael Wood had argued that draft conclusions 22 and 23 differed from the other draft conclusions proposed for the topic in that they did not address methodological questions. Mr. Zagaynov, for example, had correctly observed that draft conclusions 22 and 23 concerned the specific consequences of certain *jus cogens* norms in connection with crimes under international law, such as the prohibition of genocide, rather than *jus cogens* norms in general. Mr. Zagaynov had asked why the consequences of self-determination had not been considered separately. It might equally be asked why the consequences of the use of force, racial discrimination and so forth had not been considered. Mr. Nolte had observed that one focus of the Commission's work on the topic was the methodology used to determine all the rules of *jus cogens* and their consequences and that, if the Commission sought to determine the specific consequences of certain rules of *jus cogens*, such as those on genocide, war crimes or crimes against humanity, it would also need to consider the specific consequences of other rules. Mr. Nolte had also mentioned self-determination as an example.

Those were all good points, and he agreed that they constituted a reason not to include draft conclusions 22 and 23. However, he recalled that explicit reference was made to the issue of immunities in paragraph 17 of the syllabus for the topic. Although Mr. Zagaynov and Mr. Rajput had not been members of the Commission when the syllabus had been discussed, Mr. Murphy, Mr. Nolte, Sir Michael Wood and Mr. Huang had been. The discrepancy between the issue of immunities and the methodological nature of the topic had not been raised. Although Mr. Murphy had actively participated in the Commission's discussion of the syllabus, he had, at that time, not argued against the consideration of the issue of immunities on the grounds that it concerned primary, substantive rules. It was strange that such an argument was being made for the first time and that the consideration of an issue that had been proposed in the syllabus should cause such surprise.

In that connection, he took exception to Mr. Rajput's suggestion that the treatment of the topic was an attempt to capitalize on the divided opinion that had emerged in the Commission in relation to the topic of immunity of State officials from foreign criminal

jurisdiction. The syllabus showed clearly that the issue of immunities had been planned for consideration as part of the topic of peremptory norms of general international law long before 2017. For that reason, its inclusion could not be attributed to any such motives.

Mr. Nolte had been correct to link the proposal to address immunities with the proposal to draft an illustrative list, as they both related more to primary, substantive rules than to the methodological focus of the topic. Members would recall that he had yet to decide what should be proposed as part of such an illustrative list. His indecision stemmed from a recognition of the same distinction between substance and methodology to which a number of Commission members had drawn attention in relation to his third report. From the outset, some States and some Commission members had raised concerns regarding the inclusion of an illustrative list, which had led him to wonder whether such a list should be included at all. However, the same could not be said of immunities. Some Commission members had suggested that the Commission should postpone its consideration of the issue of immunities in the context of the current topic until it had considered exceptions to immunity as part of the topic of immunity of State officials from foreign criminal jurisdiction. But it had never before been suggested that the issue of immunities should not be considered at all. Indeed, it was such a prominent part of the topic of peremptory norms of general international law that, in the 2015 volume of the *Netherlands Yearbook of International Law*, Alexander Orakhelashvili had criticized in some detail the approach that he assumed the Commission would take towards it.

Nevertheless, regardless of the fact that the issue of immunities was included in the syllabus, there was no doubt that a number of Commission members had raised a legitimate substantive concern. Ms. Lehto had quite correctly observed that the decision to consider the issue of immunities reflected a focus on the potential consequences of *jus cogens* that had most often been identified. Mr. Murphy and other Commission members had also argued that the consideration of exceptions to immunity would interfere with the topics of crimes against humanity and immunity of State officials from foreign criminal jurisdiction. Indeed, Mr. Murphy had suggested that it would make it impossible for the Commission to find a solution in the context of its work on the topic of immunity of State officials from foreign criminal jurisdiction. However, a solution had already been found in the form of the majority vote on draft article 7 on that topic. Other members who had supported the content of draft conclusion 23 had also drawn attention to the need to avoid an overlap with the topic of immunity of State officials from foreign criminal jurisdiction. On that point, he shared Ms. Lehto's view, namely that draft conclusion 23 was a general rule, whereas draft article 7 on immunity of State officials from foreign criminal jurisdiction was a specific rule. It had also been argued that draft conclusion 23 was broader than draft article 7.

Mr. Murphy had said that the treatment of the issue of crimes against humanity as part of the topic of peremptory norms of general international law would have a negative impact on the Commission's work on the topic of crimes against humanity. He had explained that Governments had intimated to him that draft conclusion 23 risked dashing any hope of a convention on crimes against humanity. Regardless of whether the draft conclusion did indeed pose such a risk, the Commission could not make decisions on the basis of private conversations to which it had not been privy. In late 2017, when draft article 7 on immunity of State officials from foreign criminal jurisdiction had been debated in the Sixth Committee, no State had mentioned that the establishment of an immunity exception to crimes against humanity would jeopardize the hopes of a convention on crimes against humanity.

It was also unfair to blame the Commission's work on one topic for the possible failure of its work on another. He hoped that the General Assembly would decide to prepare a convention on crimes against humanity, but, if it did not, it was unlikely that his third report would be to blame, even if the Commission did adopt draft conclusion 23. There might be other reasons, for example the general reluctance of the Sixth Committee to elaborate conventions or its practice of consensus. It was clear, for instance, that many States wished to uphold the articles on responsibility of States for internationally wrongful acts as a treaty, but, owing to the practice of consensus, a minority of States were able to block any move in that direction. In addition, any future decision not to prepare a convention on crimes against humanity might also be attributed to the Commission's

decision not to include all core crimes within the scope of that topic. He had argued from the outset that the topic of crimes against humanity should be expanded, but his had been a lone voice in the Commission. Ms. Escobar Hernández and Mr. Jalloh had subsequently made the same argument, but the Commission had ultimately submitted to the will of the majority.

With regard to the substance of draft conclusions 22 and 23, Mr. Murphy had taken issue with the "novel arguments" advanced in support of draft conclusion 23, which he found "incredible" and "misleading". By "novel arguments", Mr. Murphy was referring to the distinction between criminal and civil proceedings. However, he (Mr. Tladi) had himself made the very same argument in his statement on the fifth report of the Special Rapporteur for the topic of immunity of State officials from foreign criminal jurisdiction. Indeed, his main criticism of that report had been that a distinction of that kind had not been made. Other Commission members had also made that distinction. For that reason, there was nothing novel about those arguments.

Although Mr. Murphy had, in his oral statement, not given the reasons for his characterization of the arguments advanced in support of draft conclusion 23 as "incredible" and "misleading", the footnotes in the written version of his statement gave an indication as to his reasoning. In one footnote, Mr. Murphy had stressed that the relevance of the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* had been made clear in the syllabus for the topic. That was a surprising statement, as, in its judgment on the case, the International Court of Justice had taken the same approach that he had taken in his third report. In paragraph 91 of its judgment, the Court had emphasized that, in reaching its conclusion, it was addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State had not been in issue in the case. The Court had reiterated the distinction between the immunity of the State from civil proceedings and the immunity of officials from criminal jurisdiction elsewhere in its judgment on the case. The fact that the case had been referred to in the syllabus was frankly irrelevant. The syllabus offered a survey of court decisions and other sources and made no claims regarding the content of the rules. The syllabus set out the topic to be studied and did not itself constitute the study. Moreover, the case concerning *Jurisdictional Immunities of the State* had not simply been discarded, as Mr. Murphy had implied. The very basis of the distinction that Mr. Murphy had described as novel had been derived from that case, among others.

In another footnote, Mr. Murphy had argued that, although practice relating to civil proceedings had been deemed irrelevant in the third report, the Special Rapporteur had nevertheless cited civil cases in support of his position, in particular *Yousuf v. Samantar*, which had been cited in footnotes 316 and 339. However, in footnote 316, *Yousuf v. Samantar* had been cited only as an example of the sources used by commentators who relied on practice relating to civil proceedings in order to reach conclusions regarding immunity from criminal prosecution. In the relevant paragraph in his report, he had concluded that it was practice related to criminal proceedings that had to form the basis of any international law rule relating to exceptions to immunity on account of *jus cogens* crimes. In footnote 339, *Yousuf v. Samantar* had been cited for the same reason as *Jurisdictional Immunities of the State*, namely to support the view that cases relating to civil proceedings should not be used as authorities in relation to exceptions from immunity in the criminal context.

Thus, the parts of Mr. Murphy's statement that addressed the "novel arguments" advanced in the third report were themselves incredible and misleading. It was for that reason, among others, that short reports were preferable: readers often became tired and missed the nuances.

Mr. Nolte had made many substantive comments with which he disagreed. In general, those comments concerned the availability of practice. As Ms. Lehto and Ms. Escobar Hernández had argued in their statements, there was an abundance of practice. The main flaw in Mr. Nolte's statement was that he had assumed, incorrectly, that the report bestowed peremptory status on the effects themselves. It would be extremely surprising if Mr. Nolte was seeking to suggest that the available practice was not sufficient even for an

ordinary rule of customary international law, as the Commission had in the past based important draft conclusions on even less practice. It should be recalled that, as had previously been noted by many Commission members, the persistent objector rule had been included in its draft conclusions on the identification of customary international law on the strength of the *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)* case alone.

Mr. Nolte had argued that, as the International Court of Justice had asserted that substantive norms of *jus cogens* and rules on immunity, which were procedural in nature, were sets of rules that addressed different matters, draft conclusion 23 (2) was problematic. However, the paragraphs that Mr. Nolte had cited from the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* were of no relevance to that distinction, which had been made in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. In addition, an entirely separate distinction was made in paragraph 60 of the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, namely a distinction between immunity and criminal responsibility. That second distinction had been captured in the draft articles on crimes against humanity.

Mr. Murphy had ended his statement by suggesting that the Commission's special rapporteurs for other topics should have been consulted prior to the proposal of draft conclusion 23. However, the topics on which the Commission's special rapporteurs worked were not their own, but were those of the Commission as a whole. It was for the Commission to determine whether the special rapporteur for a given topic had made a decision or a recommendation that would negatively affect its work on another topic. In fact, as the Special Rapporteur for the topic of peremptory norms of general international law (*jus cogens*), he would be acting in bad faith if he deprived the Commission of the outcomes of his research on the basis of backroom deals struck with other special rapporteurs.

The report was the only instrument over which the special rapporteur for a given topic should have full control. Special rapporteurs should not be guided by a desire to avoid offending other Commission members or creating divisions within the Commission. In addition, it had never before been claimed that a special rapporteur was required to consult other special rapporteurs. Although it was argued in paragraph 39 of the first report of the Special Rapporteur for the topic of crimes against humanity that the prohibition of such crimes was a *jus cogens* norm, he had never been consulted by Mr. Murphy, who was the Special Rapporteur for that topic. In the fifth report of the Special Rapporteur for the topic of identification of customary international law, Sir Michael Wood, a "without prejudice" clause on the persistent objector had been proposed for *jus cogens* norms. Sir Michael Wood had not discussed the matter with other special rapporteurs, as it was his duty to consider materials and make proposals to the Commission on the basis of those materials.

Some Commission members who strongly supported draft conclusions 22 and 23 had proposed that, although draft conclusion 23 should be referred to the Drafting Committee, it should be left in abeyance until the Commission had completed its work on the topic of immunity of State officials from foreign criminal jurisdiction. He had initially been attracted to that proposal. However, having listened to the debate, and recalling the argument made by a number of Commission members that draft conclusions 22 and 23 were inherently different from the others that had been proposed for the topic, as they addressed substantive, primary rules, such a course of action would merely delay the inevitable.

Mr. Murase, for example, had stated that he could agree with draft conclusions 22 and 23 if the Commission knew what crimes were covered by them. However, he (Mr. Hladi) would be reluctant to limit the list of *jus cogens* crimes to those identified in draft article 7 on the immunity of State officials from foreign criminal jurisdiction. The effect of doing so would be to halt the development of an important area of law. It would be possible to provide an illustrative list of such crimes, but to do so would not be consistent with draft article 7. Some Commission members had made the point that the topic of immunity of State officials from foreign criminal jurisdiction excluded immunities covered under specialized treaty regimes. By extension, such immunities would presumably also be

excluded from the scope of draft conclusions 22 and 23. However, he would be reluctant to suggest that rules relating to *jus cogens* crimes were subject to treaty regimes. He had thus concluded that any such attempt was fraught with difficulty. The problem could not be resolved by referring the draft conclusions to the Drafting Committee and leaving them in abeyance. It might, therefore, be preferable not to address issues relating to such substantive, primary rules as part of the current topic and to justify the non-inclusion of the two draft conclusions on that basis.

There was another reason for not attempting to address issues relating to primary rules. He believed that, for criminal matters, there was an exception to immunity *ratione materiae* under international law for all *jus cogens* crimes. However, he also believed that there was no exception for immunity *ratione personae*. Nevertheless, he was reluctant to include in the draft conclusions a provision recognizing that there was no exception to immunity *ratione personae*. In fact, he believed that there was no exception for the immunity of officials or of the State in civil proceedings for *jus cogens* crimes. It was his impression that, although courts might wish that there was such an exception, they would not make the first step in that direction.

For those reasons, he believed that the Commission should not attempt to address the issue of immunities. In any case, he was of the view that draft conclusions 22 and 23 should be dealt with as a pair. However, it should be borne in mind that the issue of immunities was often discussed, both in academic literature and by the courts, that it had explicitly been stated in the syllabus that it would be considered and that it had been included in the third report. As such, if the Commission remained silent on the matter, its silence would be interpreted as evidence that there were no exceptions to immunity *ratione materiae* for *jus cogens* crimes. For that reason, a "without prejudice" clause might be the most appropriate solution.

On that basis, he proposed that the two draft conclusions should be transmitted to the Drafting Committee on the understanding that they should be redrafted as "without prejudice" clauses. He proposed that the two draft conclusions should be accompanied by a text to the effect that: "The present draft conclusions are without prejudice to the consequences of specific/individual/particular peremptory norms of general international law (*jus cogens*)." That text did not include the word "immunity", but it would of course be mentioned in the commentary that immunity was one of those consequences, and he undertook to draft the commentary in a non-prejudicial manner. His proposal was, he believed, an optimal one from a substantive perspective and from the perspective of the internal harmony of the Commission.

He had taken note of Commission members' comments regarding the future programme of work and would consider them carefully in the preparation of his fourth report. He hoped that the Commission would be in a position to refer the proposed draft conclusions to the Drafting Committee.

The Chair said he took it that the Commission wished to refer draft conclusions 10 to 23 to the Drafting Committee, taking into account the comments and suggestions made in the plenary debate, and that, with regard to draft conclusions 22 and 23, the Drafting Committee would work on the basis of the proposal made by the Special Rapporteur at the current meeting.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the topic of peremptory norms of general international law (*jus cogens*) was composed of Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Huang, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Zagaynov, together with Mr. Tladi (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), *ex officio*.

The meeting rose at 4.55 p.m. to enable the Drafting Committee on peremptory norms of general international law (jus cogens) to meet.